UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

SUMMIT MEDICAL CENTER

Employer

and Case 32-UC-356

HEALTH CARE WORKERS UNION
LOCAL 250, SEIU, AFL-CIO

Petitioner

and

TECHNICAL, OFFICE AND PROFESSIONAL
DIVISION OF INTERNATIONAL LONGSHORE
& WAREHOUSE UNION, LOCAL 6, AFL-CIO

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[1], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is a California corporation with an office and place of business in Oakland, California where it is engaged in the operation of an acute-care

[1] Briefs filed by the parties have been duly considered.

hospital. During the past twelve months, the Employer has derived gross revenues in excess of $250,000 and has purchased and received goods or services valued in excess of $15,000 which originated outside the State of California. On this basis, I find that the Employer is engaged in commerce within the meaning of the Act and, accordingly, the assertion of jurisdiction is appropriate herein.

3. The Petitioner and Intervenor are both labor organizations within the meaning of Section 2(5) of the Act and represent certain employees of the Employer.

4. Historically, Petitioner and Intervenor have represented separate units of the Employer's employees and, at all material times, have been parties to separate collective bargaining agreements with the Employer. Petitioner represents a service and maintenance unit which includes, among others, licensed vocational nurses (LVNs) and nurse attendants. Petitioner's current contract with the Employer is effective May 1, 1996 through April 30, 2000. The previous contract was effective May 1, 1994 through April 30, 1996. The Intervenor represents a residual unit consisting of all unrepresented technical employees; its current contract with the Employer being effective July 1, 1997 to June 30, 1999.

In approximately March 1996, the Employer created the position of Emergency Service Technician (EST) to perform various functions in the emergency room only. The Employer required that all ESTs receive certifications in certain areas, including emergency medical technician, phlebotomy and CPR. As a result, the Employer determined that, since the ESTs would be performing work of a technical nature, they were properly included in the unit represented by the Intervenor. Shortly thereafter, the Employer and Intervenor negotiated wage rates and other terms for the EST position.

On May 2, 1996, one day after its current contract became effective, Petitioner filed a grievance under that contract, asserting that the Employer created the EST position to replace certain of its unit employees and making its initial claim to represent the employees in the EST position. There is no record evidence that Petitioner, at the time of execution of its collective bargaining agreement with the Employer, agreed to reserve for later resolution the issue of unit placement of the ESTs. On August 26, 1996, Petitioner requested arbitration of this grievance. While this grievance was still pending, the Employer and Intervenor entered into a successor contract, effective July 1, 1997, which included the EST classification as part of the bargaining unit.

Sometime during the first part of 1998, however, the Employer changed its position and declared an intent to accrete the ESTs to the Petitioner's unit on the basis that the ESTs were performing different duties than had originally been anticipated. Thus, according to the Employer at that time, the ESTs were not performing technical duties as permitted by their EMT licenses but rather were administering basic first aid under the direction of an LVN or registered nurse. There is no contention, nor is there any record evidence, that the actual duties performed by the ESTs have changed in any way since the creation of the position.

On May 1, 1998, the Intervenor filed a grievance under its contract as well as an unfair labor practice charge (Case 32-CA-16744) protesting the proposed transfer of the ESTs from their bargaining unit. On May 29, 1998, the Employer advised Petitioner it would not transfer the ESTs to another unit until the dispute regarding the unit placement of the ESTs was resolved.

On July 30, 1998, Complaint and Notice of Hearing issued in Case 32-CA-16744 alleging the proposed transfer of the ESTs to another bargaining unit to be an unfair labor practice. On August 25, 1998, Petitioner presented its grievance to an arbitrator, who on September 3, 1998, ruled that the ESTs should be part of Petitioner's unit based on the recognition clause of the parties' contract.[2]

Although the Employer takes a neutral position in the instant proceeding, it asserts that a UC petition is the proper procedure for determining the placement of the ESTs. Petitioner contends that the ESTs should be included in its service and maintenance unit because they are not technical employees and their duties are very similar to those of LVNs. The Intervenor takes the position that the petition must be dismissed because of the established past practice as to the placement of the ESTs in the bargaining unit represented by the Intervenor. Alternatively, the Intervenor argues that the ESTs are technical employees and, therefore, appropriately belong in its bargaining unit, particularly in view of the Board's rulemaking in health care units.

In Union Electric Company, 217 NLRB 666 at 667 (1975), the Board stated its policy on UC petitions as follows:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

[2] Petitioner concedes that the arbitrator's ruling on the bargaining unit is not binding on the Board.

The classification of EST was not a newly established one at the time this UC petition was filed on December 8, 1998. Thus, the evidence discloses that the Employer created and began filling it in March 1996. Nor is this a situation where there have been recent and substantial changes in the duties and responsibilities of the ESTs. Rather, notwithstanding that the ESTs have never been able to perform certain duties in the hospital as originally contemplated by the Employer due to State regulations, the record evidence establishes that the ESTs' duties and responsibilities have not changed since the position was created.

The ESTs have been covered under two successive collective bargaining agreements between the Employer and Intervenor. The Employer and Intervenor initially negotiated wages and other terms for the ESTs under the contract in effect in 1996. They again included the ESTs as part of the bargaining unit under the 1997-1999 contract. Although a new contract between the Employer and Petitioner became effective May 1, 1996, Petitioner waited until May 2, 1996 to file any type of official claim regarding placement of the ESTs.

Under these circumstances, clarification is not appropriate. The Employer and Intervenor have included the ESTs as part of the residual technical bargaining unit since the creation of the EST classification in 1996 and have specifically included the ESTs in the bargaining unit description in their current contract. To permit clarification here would disrupt that collective bargaining agreement, a situation that the Board has specifically found to be inappropriate. See The Washington Post Company, 256 NLRB 1243 (1981); Arthur C. Logan Memorial Hospital, 231 NLRB 778 (1977). Further, even if the ESTs had not already been part of the residual technical unit, the evidence shows

that Petitioner entered into its current collective bargaining agreement with the Employer prior to its initial claim to represent the ESTs without having reserved this issue for later resolution. The processing of a unit clarification petition in this circumstance would similarly be inappropriate as it would not be timely. Ibid. Accordingly,

IT IS HEREBY ORDERED that the petition in this matter be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 8, 1999.

Dated at Oakland, California, this 25th day of May, 1999.

/s/ James S. Scott

_____

James S. Scott
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612

385-7533-2020